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IN THE

Supreme Court of the United States

October Term, 1939. No. 92.

JOHN E. MADDEN, Jr., Executor of the Estate of JOHN E. MADDEN, Deceased, - - - *Appellant,*

versus

COMMONWEALTH OF KENTUCKY, by James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, - - - - - - *Appellee.*

Appeal from the Court of Appeals of the Commonwealth of Kentucky.

BRIEF FOR JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED.

A State statute which imposes on its citizen an *ad valorem* tax on his deposits in banks outside that State five times greater than the tax which it imposes on deposits in banks located within that State, violates the "privileges and immunities", "equal protection" and "due process" clauses of Sec. 1, 14th Amendment.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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[Summary of References Required by Rules 12 and 27]

OPINIONS BELOW: *Commonwealth* v. *Madden's Ex'r.*, 265 Ky. 684, 97 S. W. (2d) 561; R. 54-61; *Madden's Ex'r.* v. *Commonwealth of Kentucky*, 277 Ky. 343, 126 S. W. (2d) 463; R. 77-81.

JURISDICTIONAL AUTHORITY: Judicial Code §237a (28 U. S. C. 344a), as amended by the Act of January 31, 1928 (45 Stat. 54).

NATURE OF THE CASE, RULINGS, ETC.: Kentucky sued the Executor of Madden (a citizen of Kentucky) to collect *ad valorem* taxes on Madden's deposits in his lifetime in New York banks, during the years 1924-29, inclusive.

Ky. Stat. §4019a-1 imposes a tax at the rate of 10 cents on each $100 of deposits in state and national Kentucky banks; but, §4019a-10 (as *construed* with §4019 by the Court of Appeals of Kentucky in this action) imposes a tax at the rate of 50 cents upon each $100 of deposits in banks *outside* Kentucky, or five times the amount imposed on domestic deposits.

The Court of Appeals of Kentucky held, against the Executor's contention, that the imposition by §4019a-10 of a *five* fold tax on *outside* deposits does not violate either (1) the "privileges or immunities" or (2) the "due process" or (3) the "equal protection" clauses of Section 1 of the 14th Amendment to the Constitution of the United States.

STATUTES INVOLVED: Carroll's Kentucky Statutes, Baldwin's Revision, 1930, §4019, p. 2048 (Ky. Acts 1924, Ch. 116, §1, p. 403 as reenacted in Ky. Acts 1926, Ch. 164, p. 739; §4019a-1, pp. 2049-2050 (Ky. Acts 1924, Ch. 116, §8, p. 413); §4019a-10, p. 2052 (Ky. Acts 1924, Ch. 116, §3, p. 407); United States Constitution, 14 Amendment, Sec. 1.

DATE OF JUDGMENT, ETC.: March 10, 1939 (R. 77), affirming judgment of Fayette Circuit Court entered January 22, 1938 (R. 68); this appeal applied for and allowed by Court of Appeals of Kentucky, May 9, 1939 (R. 81, 85-86).

ASSIGNED ERRORS: The requirement of the Kentucky Statutes, as *construed* by the Court of Appeals of Kentucky, (*a*) that a Kentucky resident must pay *ad valorem* taxes at the rate of 50 cents upon each $100 of moneys deposited in banks located *outside* Kentucky, (*b*) whereas moneys deposited in banks *within* Kentucky are taxed for the same purposes at the rate of only 10 cents upon each $100 thereof (1) *abridges* the taxpayer's privileges and immunities as a citizen of the United States, (2) *deprives* him of his liberty and property without due process of law, and (3) *denies* to him the equal protection of the laws, in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States (R. 83-4, 89-90).

IN THE

Supreme Court of the United States

October Term, 1939. No. 92.

JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED, - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, BY JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY, - - *Appellee.*

Appeal from the Court of Appeals of the Commonwealth of Kentucky.

OPINIONS BELOW: *First* appeal, *Commonwealth* v. *Madden's Executor*, 265 Ky. 684; *Second* appeal, *Madden's Executor* v. *Commonwealth of Kentucky*, 277 Ky. 343.

BRIEF FOR JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED.

The *sole* question involved is whether Kentucky has the power [consistent with the Federal Constitution] to require one of its citizens (who is also a citizen of the United States) to pay *ad valorem* taxes on moneys

deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100 thereof, *whereas* it taxes moneys on deposit in national and state banks and trust companies located within Kentucky at only 10 cents upon each $100 thereof.

Grounds for Invoking This Court's Jurisdiction.

This case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. 54) was passed, to-wit: under §237a of the Judicial Code, 28 U. S. C. §344(a), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right; because, by the final judgment of the Court of Appeals of Kentucky, which is the highest court of that State in which a decision in this suit could be had, there was drawn in question the validity of a statute of Kentucky on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

STATEMENT OF THE CASE.

John E. Madden (a citizen and resident of Fayette County, Kentucky, on July 1, 1924 and until his death on November 3, 1929 (R. 1, 40, 48) had moneys on deposit in New York banks as of July 1 of each year, which he had not listed for taxation in Kentucky, as follows (R. 20-24, 39-40, 49, 70-71):

Year	*Amount*
1924	$63,995
1925	56,100
1926	99,900
1927	58,900
1928	40,000
1929	58,100

The State of Kentucky sued his Executor to have such deposits assessed (as property omitted from taxation) and to recover *ad valorem* taxes of 50 cents upon each $100 of such deposits as of July 1 of each year, which is Kentucky's assessment date.*

The Executor's defense was that such deposits *outside* Kentucky (1) were taxable only at the rate of 10 cents upon each $100 (to-wit, the rate prescribed by Ky. Stat., 1930, §§4019, 4019a-1, for taxation of similar deposits in banks located *within* Kentucky) and (2) the imposition of a tax on such deposits at the rate of 50 cents upon each $100 (as attempted to be done by Ky. Stat., §4019a-10 read with §4019, for taxation of similar deposits in banks located *outside* Kentucky), would (I) *abridge* Mr. Madden's privileges and immunities as a citizen of the United States, (II) *deprive* him of his property and his liberty to keep moneys on deposit outside Kentucky without due process of law and (III) *deny* to him the equal protection of the laws, in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States (R. 31-2, 47, 50, 58-61, 64, 65, 75, 79-80).

*The State also sought to recover penalties and interest; and also to have similarly assessed taxes on other property not involved on this appeal.

The Proceedings in the Lower Courts.

The Fayette County Court, in which the suit was commenced upheld the Executor's defense and assessed the deposits at the rate of only 10 cents upon each $100 thereof (R. 41).

The Fayette Circuit Court, to which the Commonwealth appealed (and in which there was a trial *de novo,* in accordance with Kentucky practice), likewise held that the deposits should be assessed at only 10 cents upon each $100 thereof and that a taxation of the deposits

> "at a higher rate than that applicable to bank accounts within the State of Kentucky, * * * will [cause the Executor to] be deprived of his property without due process of law and will [cause the Executor to] be denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States * * *" (R. 50).

The Court of Appeals of Kentucky, on the Commonwealth's appeal to it, held that the taxation of such deposits at the higher rate of 50 cents upon each $100 would not deny to the Executor the equal protection of the laws nor abridge his privileges or immunities in violation of the 14th Amendment (R. 58-61; 265 Ky. 684, 689-693). It reversed the Fayette Circuit Court's judgment and remanded the suit "for proceedings not inconsistent with the opinion herein" (R. 54).

The Fayette Circuit Court, on the return of the case,

(1) Found as a fact that it was the *universal practice* in Kentucky to assess bank accounts at the rate of only 10 cents upon each $100 thereof and that such universal practice prevailed during the years 1924 to 1929 herein involved (R. 74);

(2) Concluded as a matter of law that the imposition of a tax five fold the amount imposed upon such accounts of Kentucky citizens in banks *within* Kentucky abridged the "privileges and immunities of a citizen of the United States," and was discriminatory in violation of the "privileges and immunities," and the "due process" and the "equal protection" clauses of the 14th Amendment to the Constitution of the United States (R. 75); but,

(3) But decided the mandate of the Court of Appeals bound it; and accordingly it assessed (for the first time) Madden's deposits in banks located outside Kentucky at the rate of 50 cents upon each $100 (R. 72), and gave judgment against the Executor on account thereof.

The Court of Appeals of Kentucky, on the (second) Executor's appeal, affirmed that assessment and judgment (R. 77-81; 277 Ky. 343).

The Questions Involved Are Substantial.

The questions under the 14th Amendment were raised by answer in the Fayette County Court (R. 31-2), by amended answer in the Fayette Circuit Court

(R. 65), by requests for findings of fact and conclusions of law in the Circuit Court (R. 47, 64) and by argument in, and a consideration by, the Court of Appeals of Kentucky on both appeals (R. 58-61, 265 Ky. 684, 689-693; R. 77-81, 277 Ky. 343).

The questions involved are substantial, because if the decision of the Court of Kentucky is permitted to stand, the imposition on a Kentucky citizen of a tax against his deposits in banks *outside* Kentucky *five times an amount greater* than the tax imposed on similar deposits in banks *within* Kentucky will not only deprive him of his property without due process of law and deny to him the equal protection of the laws, but will also abridge his rights as a citizen of the United States to do a banking business in any State other than that of his residence.

Consequently, the case presents the fundamental question of the power of a State to prohibit its citizens from exercising the rights which they have as citizens of the United States to do business on equal terms throughout the United States.

The Statutes of Kentucky, the Validity of Which Is Involved.

Carroll's Kentucky Statutes, Baldwin Revision, 1930, §4019a-10, p. 2052 (Ky. Acts, 1924, Ch. 116, §3, p. 407) provides:

> "All property subject to taxation for state purposes shall be subject also to taxation in the county,

city, school or other taxing district in which same has a taxable situs, except the following classes of property, which shall be subject to taxation for state purposes only: * * *

"(4) Money in hand, notes, bonds, *accounts or other credits,* whether secured by mortgage, pledge or otherwise, or unsecured, and shares of stock; * * *"

The rate applicable to the taxation of such property for State purposes (for the years in question) is prescribed by Carroll's Kentucky Statutes, Baldwin's Revision 1930, §4019, p. 2048 (Ky. Acts 1924, Ch. 116, §1, p. 403, as reenacted in Ky. Acts 1926, Ch. 164, p. 739), as follows:

"An annual ad valorem tax for state purposes of thirty (30c) cents upon each one hundred ($100.00) dollars of value of all real estate directed to be assessed for taxation, as provided by law, and fifty (50c) cents upon each one hundred ($100.00) dollars of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed; except a tax at the rate of one-tenth of one (1%) per cent [*i. e.,* 10 cents upon each $100] shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State as now provided by law; * * *."

Carroll's Kentucky Statutes, Baldwin's Revision, 1930, §4019a-1, pp. 2049-2050 (Ky. Acts 1924, Ch. 116,

§8, p. 413), provides, with respect of tax on bank deposits in banks *within* Kentucky, as follows:

> "Every person, firm or corporation having on the first day of July, a deposit in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, shall pay a tax to the State which is hereby assessed at the rate of one-tenth of one per cent [*i. e.,* 10 cents upon each $100] annually, upon the amount of such deposit so held by such bank on the first day of July, and no deductions therefrom should be made on account of any indebtedness. * * *"

In this case, the Court of Appeals of Kentucky construed (R. 58-61, 78-81) the above quoted Kentucky Statute, §4019a-10, when read with §4019, as requiring citizens of Kentucky to pay taxes at the rate of 50 cents upon each $100 of moneys deposited in banks located *outside* the State of Kentucky, to-wit, at the rate of provided by the above quoted Kentucky Statute, §4019, instead of at the rate of 10 cents upon the $100 provided by §4019a-1. The Executor challenges the validity of such Statutes, *as so construed.*

Assigned Errors which are urged. The Executor will urge the assignment of errors, numbered 1 to 4, inclusive (R. 83-85, cf. 89-90) and will contend that the discriminatory rate of taxation applied to the deposits in banks outside the State of Kentucky violates (1) the "privileges and immunities," (2) the "due process" and (3) the "equal protection" clauses of Sec. 1 of the 14th Amendment.

SUMMARY OF POINTS DISCUSSED.

1. The privileges and immunities of a citizen of the United States are abridged by a State statute which imposes on him taxes on his moneys deposited in banks outside the State of his residence at a rate five times greater than that which such State imposes on moneys deposited in banks within the State, to-wit: at the rate of 50 cents on each $100 thereof as against 10 cents on each $100 (pp. 9-16, *infra*).

2. The Kentucky statute, as construed by the Kentucky Court, denies to the Executor the equal protection of the laws and deprives him of his property without due process of law (pp. 16-22, *infra*).

FIRST POINT.

The privileges and immunities of a citizen of the United States are abridged by a State statute which imposes on him taxes on his moneys deposited in banks outside the State of his residence at a rate five times greater than that which such State imposes on moneys deposited in banks within the State, to-wit: at the rate of 50 cents on each $100 as against 10 cents on each $100.

The 14th Amendment, Section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *"

A CASE DIRECTLY IN POINT.

Colgate v. *Harvey*, 296 U. S. 404, involved the constitutionality of a Vermont statute which imposed a tax on income received by a resident of that State on any interest-bearing security; but the statute provided that such income should not include "interest received on account of money loaned *within* this State" unless the loan within the State was at an interest rate exceeding 5% per annum, etc.

The Vermont court construed that statute to tax as income interest received on all loans made *outside* the State irrespective of the interest rate, etc., but to exempt interest on loans made *within* the State unless the interest rate was in excess of that provided by the Statute.

This Court held that such statute, as thus construed, violated the "equal protection" and the "privileges and immunities" clauses of the 14th Amendment. It said that a citizen of the United States is *ipso facto* a citizen of the State in which he resides; that the 14th Amendment prohibits any State from abridging the privileges or immunities of a citizen of the United States, irrespective of whether or not he is one of its own citizens; that a State law which prohibits the exercise of the right to engage in business or make a lawful loan of money in any State other than that in which the citizen resided violates this clause of the 14th Amendment; that if a State could levy a discriminatory tax against the income received from money loaned *outside* the State, it could prohibit all trans-

actions by its citizens (who are citizens of the United States) with persons living outside the State; and,

"But, assuming that the state of Vermont is benefited by the exemption, the complete answer is that *appellant is a citizen of the United States;* and, quite apart from the equal protection of the laws clause, the suggestion is effectively met and overcome, and the fallacy of other attempts to sustain the validity of the exemption here under review clearly demonstrated, by reference to the privileges and immunities clause of the Fourteenth Amendment. * * *

"The right of a citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money in *any* state *other* than that in which the citizen *resides* is a privilege equally attributable to his *national citizenship.* A state law prohibiting the exercise of any of these rights in another state would, therefore, be *invalid* under the Fourteenth Amendment. The imposition by one state of a *discriminating tax* upon a citizen resident in another state for trading in the territory of the former has been held invalid. *Ward* v. *Maryland,* 12 Wall. 418, 430. And, of course, conversely, a tax of *that description* is likewise *void* if imposed by one state upon a *resident* citizen of the United States for trading or doing business in the territory of *another* state. And such a tax is *not* justified because the taxing state will thereby help its *domestic* business. * * *

"It follows from what has been said that when a citizen of the United States residing in Vermont goes into New Hampshire, he does not enter *for-*

eign territory, but passes from one field into another field of the *same* national domain. When he trades, buys or sells, contracts or negotiates across the state line, when he *loans money,* or takes out insurance in New Hampshire whether in doing so he remains in Vermont or not—*he exercises rights of national citizenship which the law of neither state can abridge without coming into conflict with the supreme authority of the Federal Constitution.*

"The statute, as here applied, says that if a citizen resident in Vermont loan his money at 5% or less in *another* state, he must pay a tax upon the income; but if he loan money in *Vermont* at the same rate, no tax whatever shall be imposed. The power to tax income here asserted by Vermont is, in the final analysis, the power to tax so heavily as to *preclude* loans *outside* the state altogether. It reasonably is not open to doubt that the *discriminatory tax* here imposed abridges the privilege of a citizen of the United States to loan his money and make contracts with respect thereto in *any* part of the United States."

If a State cannot, consistent with the 14th Amendment, impose a discriminatory tax against the income received from money loaned outside the State, for the same reason, it may not impose a discriminatory *ad valorem* tax upon loans made outside the State and a deposit of money in a bank is in all essential respects a *loan* of money (*Pendleton* v. *Commonwealth,* 110 Va. 229; *Campbell* v. *Watson,* 62 N. J. Eq. 396; *cf. Thompson* v. *Riggs,* 5 Wall. 663, 680).

Under the *Colgate* case, *supra,* Kentucky could not tax the *income* from a time deposit in banks *outside* the State at a higher rate than is applied to income from time deposits in banks *within* the State. It could not require the payment of a higher *ad valorem* tax on such time deposits made in banks outside the State; and it would be equally a violation of the principle laid down in the *Colgate* case to permit a discriminatory *ad valorem* tax against deposits of moneys made in banks outside the State.

If it be suggested that the purpose of imposing a tax on moneys deposited in banks outside the State at five times the rate applicable to moneys deposited in banks within the State is that of the State's convenience in the collection of taxes in that the State or the State may more readily verify the taxpayer's returns and prevent tax evasion, a sufficient answer is that such considerations likewise existed in respect of the tax under consideration in the *Colgate* case. Such purposes would be accomplished only to the extent that the discrimination against the deposits made in banks outside the State is great enough to constitute a *practical prohibition* against such deposits. That purpose would not be accomplished except to the extent that the taxes upon bank deposits in other States *were* prohibitive. But if a State may prohibit its citizens from making deposits in banks outside the State merely because such prohibition will be of some assistance to the State in collecting taxes upon money on deposit, the privileges and immunities of its citizens, *as a citi-*

zen of the United States, will have been completely destroyed.

If convenience alone in the collection of the taxes justifies a more burdensome tax upon business done or property held outside the State, then the State may, for this reason alone, (1) require its citizens to pay a higher rate of income tax on business done outside the State; (2) require higher inheritance taxes to be paid on property owned by its citizens and situated outside the State; (3) require the payment of taxes at a higher rate on bonds of corporations organized under the laws of other States, on the ground that it could require reports to be made by corporations organized under its own laws; and (4) require higher taxes to be paid upon indebtedness owing to its citizens by non-resident debtors. The vice of such discrimination is that it penalizes the citizen for engaging in business in other States.

Extended to its utmost limits, it would have the effect of "Balkanizing our Nation"; and the equal privileges and immunities clauses of the 14th Amendment would be entirely nullified.

Modern banking, by its very character, performs a *national* function and is an instrument of *national* utility. State legislation which undertakes to localize its function or utility to a particular State, *ipso facto* and to that extent *destroys its national function and utility.*

The discriminatory tax against moneys deposited in banks outside the State cannot (consistent with the

14th Amendment) be justified on the ground that the Legislature may have hoped thereby to increase the business of local banks or to stimulate business within the State, at the expense of the citizens' Federal right to make lawful loans of money in any place within the United States, as was held in the *Colgate* case, ***supra.***

The Kentucky statutes in question are described in their titles as "An Act relating to Revenue and Taxation" (Ky. Acts 1924, Ch. 116, p. 402; Ky. Acts 1926, Ch. 164, p. 739).

In *Great A. & P. Tea Co.* v. *Ky. Tax Com'r,* 278 Ky. 367, the Court of Appeals of Kentucky rejected an argument that the Legislature may have had in mind some express purpose of accomplishing economic benefits for the State or its people in the enactment of a chain store tax. The Court said that the act must be considered strictly as a revenue measure, and said

> "the General Assembly, in enacting the statute under consideration, did not assume to act under the *police power* or to declare the *public policy* of the State on the subject, and, until it does so, we think it would be improper for the courts to express an opinion as to what that public policy should be. The Statute cannot be justified under our Constitution as a revenue measure, and should not be approved as a valid exercise of the police power when, on its face, it refutes the suggestion that the Legislature was attempting to promote the public welfare rather than to raise revenue."

It has been held many times that the object of tax statutes, where nothing more is said, is presumed to be

the raising of revenue (*Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 586-7); but, even assuming that the State had in mind a purpose to increase the bank deposits or business done within the State, such a purpose is not sufficient ground for depriving the citizen of his rights as a citizen of the United States to do business in other States (*Colgate* v. *Harvey, supra,* at p. 426).

SECOND POINT.

The Kentucky Statute, as construed by the Kentucky Court, denies to the executor the equal protection of the laws and deprives him of his liberty and property without due process of law.

For purposes of taxation, the situs of the deposits in banks outside the State is at the residence of the taxpayer, as in the case of deposits in banks within the State. Thus, there is no difference in the location of the taxable property.

Kentucky has undertaken to impose a tax on deposits in banks *outside* the State of *five* times more in amount than taxes imposed by it upon bank accounts *within* the State, when the only difference between the two is the residence of the *debtor banks.* The situation is the same as if Kentucky required its citizens to pay taxes of a grossly discriminatory rate upon all obligations owing to its citizens by *non*-resident debtors.

This is not a case of a slight discrimination; the difference (five fold) is so great as to manifest an intention absolutely to prohibit all deposits in banks

outside the State. No conceivable object can be accomplished by that discrimination except to the extent that it *prohibits* deposits in banks outside the State.

As we have shown (*supra,* p. 15), the only expressed purpose of the Act is to raise *revenue.* If the discrimination had been the converse, that is made in *favor* of the outside bank deposits, it might be urged that the discrimination could be justified on the ground that the State gives greater protection to the deposits in *local* banks (*Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415. But the imposition of a greatly increased rate of taxation against deposits in *outside* banks, which receive *no* protection from the State, cannot be justified.

In the *Colgate* case, *supra,* in holding that the State may not require the payment of income taxes on income from loans made outside the State while exempting from tax the income from certain of the loans made within the State, this Court said (pp. 425-426):

> "If the exemption had been made to depend upon the *time* when the loan was made, instead of upon the *locality* where it was made—as, for example, a tax upon all income from loans except those made on Mondays—the arbitrary and capricious nature of the classification would scarcely be doubted, although a minute inspection of the field of possibilities might persuade an anxious mind, bent on sustaining the tax at all events, to the view that in some far-fetched way a loan made on Monday would further some public purpose, other than that of revenue, which a loan made on another day of the week would not."

The State may urge that since it has the power of supervision of banks organized under its laws, and doing business within the State, there is a greater facility in the collection of taxes from local bank deposits. But if the discrimination can be justified upon such reasoning, then there is no *constitutional* inhibition against the State imposing a tax at a discriminatory or prohibitive rate on deposits in *National* banks which are *within* that State, because the State does not have supervision over National banks located within it such as it has over State banks.

Such reasoning would also justify a declared policy of taxing deposits in *city* banks at a higher rate than is applied to deposits in *country* banks, on the ground the city banks are larger and more readily accessible to the taxing authorities.

Such reasoning would justify taxing at a lower rate intangible property owned by domestic corporations than that owned by foreign corporations, on the ground that the State has supervisory powers over its domestic corporations and may require reports from them and thus more readily examine into their affairs.

In *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, this Court held the Kentucky mortgage recording tax invalid under the equal protection clause of the 14th Amendment, because a tax was required to be paid for recording mortgages of more than five years maturity, whereas no tax was imposed for recording mortgages of a shorter maturity. The Court said (p. 37):

> "* * * *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 155."

In *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, a State law which taxed all income of domestic corporations from business done both without and within the State, but exempted entirely the income of domestic corporations which did no business within the State, was held to violate the equal protection clause of the 14th Amendment. The Court said (pp. 415-416):

> "* * * a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. Now both of the taxing provisions here in question relate to corporations organized under the laws of Virginia. It is the object of c. 495 to exempt such corporations from income taxes (as well as taxes upon intangible property) where they do no business within the State except holding their stockholders' meetings therein; manifestly in recognition of the fact that Virginia corporations so circumstanced derive no governmental protection from the State warranting the imposition of taxes upon their incomes derived from without the State or property taxes upon their intangibles, and in recognition of the impolicy if not injustice of imposing such taxes upon them while they are liable, and presumably subjected, to taxation in the State or States where

their income-producing business is conducted. But no ground is suggested, nor can we conceive of any, sustaining this exemption which does not apply with equal or greater force as a ground for exempting from taxation the income of Virginia corporations derived from sources without the State where they also transact income-producing business within the State."

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, this Court held invalid a Louisiana statute which forbade any person in the State to do any act to effect for himself, or for another, insurance in marine insurance companies which had not qualified under the State laws. A Louisiana resident, who was an exporter of cotton was fined for mailing from New Orleans to an insurance company in New York, not qualified in Louisiana, a letter of advice or certificate of marine insurance. The State statute was held to violate the 14th Amendment. The court said (pp. 590-592):

"Has not a citizen of the State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which state legislation *cannot* deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the state statutes. * * * The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to pre-

vent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. * * *.

"In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the State. *The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. Milliken* v. *Pratt,* 125 Mass. 374; *Tilden* v. *Blair,* 21 Wall. 241."

It is too clear for argument that the attempted discrimination between deposits in banks *outside* the

State and deposits in banks *within* the State, is based upon a mere arbitrary difference which bears no reasonable or just relation to the Act in respect to which the classification is proposed.

CONCLUSION.

The judgment of the Court of Appeals of Kentucky should be reversed.

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